

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * *

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 14-CR-055-WMC

RAUL VIVAS-CEJA,

Madison, Wisconsin

March 30, 2015

Defendant.

2:00 p.m.

* * * * *

STENOGRAPHIC TRANSCRIPT OF SENTENCING HEARING
HELD BEFORE CHIEF JUDGE WILLIAM M. CONLEY

APPEARANCES:

For the Plaintiff:

Office of the United States Attorney

BY: PETER M. JAROSZ

Assistant United States Attorney

222 West Washington Avenue, Suite 700

Madison, Wisconsin 53703

For the Defendant:

Federal Defender Services of Wisconsin, Inc.

BY: JOSEPH A. BUGNI

Madison Branch Office

22 East Mifflin Street, Suite 1000

Madison, Wisconsin 53703

Also Present:

Raul Vivas-Ceja, Defendant

Lori Baker, U.S. Probation Officer

CHERYL A. SEEMAN, RMR, CRR

Official Court Reporter

United States District Court

120 North Henry Street, Room 520

Madison, Wisconsin 53703

1-608-255-3821

1 (Called to order.)

2 THE CLERK: Case No. 14-CR-55-WMC, *United States*
3 *of America v Raul Vivas-Ceja*, is called for sentencing.
4 May I have the appearances, please?

5 MR. JAROSZ: Yes. Peter Jarosz for the United
6 States. Good afternoon, Your Honor.

7 MR. BUGNI: Good afternoon, Your Honor. Joe
8 Bugni appearing on behalf of Raul Vivas-Ceja.

9 THE COURT: We are here for the sentencing of
10 Raul Vivas-Ceja. And I note that defendant is being
11 assisted by a translator and so we will begin with the
12 swearing in of the interpreter.

13 **INTERPRETER, SWORN**

14 THE INTERPRETER: Good afternoon, Your Honor.

15 THE COURT: Good afternoon. I'm sorry, I didn't
16 get your name when it came out.

17 THE INTERPRETER: Yes, Your Honor. This is
18 Laura Garcia-Hein, the staff interpreter for the United
19 States District Court in Nebraska.

20 THE COURT: Thank you, very much. And,
21 Mr. Vivas-Ceja, I take it that you are able to hear and
22 the translation is effective for you; is that correct?

23 THE DEFENDANT: Yes.

24 THE COURT: Have you had sufficient time to read
25 and discuss the presentence report, the revised reports

1 and the addendum to those reports with your counsel?

2 THE DEFENDANT: Yes.

3 THE COURT: And I understand that assuming it's
4 applicable, the government is moving for an additional
5 one-level reduction for acceptance of responsibility?

6 MR. JAROSZ: Yes, Your Honor.

7 THE COURT: That will be granted. And with
8 those preliminaries, I will accept the plea agreement
9 finding that the offense of conviction adequately
10 reflects the defendant's criminal conduct and the
11 agreement does not undermine the statutory purposes of
12 sentencing.

13 In determining a reasonable sentence I will take
14 into consideration both the advisory sentencing
15 guidelines and the statutory purposes of sentencing that
16 are set forth in Section 3553(a) of Title 18.

17 As for the guidelines, the defendant requested
18 clarifications to factual assertions in the presentence
19 report as well as raised two objections to the guidelines
20 application here. The revised report addresses those
21 clarifications and removes certain information from the
22 report, none of which affected the guideline
23 calculations.

24 The defendant also objects that Title 18, Section 16
25 of the U.S. Code is void for vagueness, although never

1 really develops that objection other than claiming that
2 it is not yet ripe, as the defendant asserts that he only
3 intends to pursue the issue if the Supreme Court issues a
4 favorable ruling in *Johnson v. United States*, which is
5 likely to address the adequacy of the definition of a
6 "violent felony" in subsection (2)(B) of Section 16. I
7 view that argument preserved and so I'm not going to
8 comment further on it.

9 As for the defendant's remaining objection, he
10 argues that his prior felony conviction for fleeing and
11 eluding an officer, in violation of Section 346.0(3) of
12 the Wisconsin Statutes, neither qualifies as an
13 aggravated felony nor warrants the eight-level increase
14 in the offense level under Section 2L1.2(b)(1)(C).

15 To be found guilty of that section a person must in
16 every instance have: (1) continued to operate a motor
17 vehicle after receiving a visual and audible signal from
18 a parked -- I'm sorry, from a marked police vehicle; and
19 (2) knowingly attempted to flee and elude the police.
20 The deliberate and conscious decision to flee from a
21 police officer by motor vehicle demonstrates a
22 defendant's lack of concern for the safety of other
23 people and property. Further, when police confront
24 someone attempting to flee and elude, they are faced with
25 a substantial risk that the situation will escalate as a

1 result of the perpetrator's intentional use of physical
2 force against them in a continued attempt to elude
3 capture.

4 Accordingly, a violation of Section 346.04(3) of the
5 Wisconsin Statutes qualifies as a crime of violence under
6 the rationale of the Seventh Circuit's opinion in *United*
7 *States v. Dismuke*, 593 F.3d 582, a 2010 decision.
8 Indeed, as the Supreme Court explained in *United States*
9 *v. Sykes* in 2011, vehicle flight from a law enforcement
10 officer ordinarily results in a dangerous confrontation
11 between the offender and the law enforcement officer and
12 others, as well as creating a substantial risk that the
13 perpetrator will intentionally use physical force to
14 continue his attempt to elude capture.

15 For this reason the defendant's past conviction
16 qualifies as a crime of violence under Section 16(b) of
17 Title 18 of the United States Code, as well as an
18 aggravated felony, warranting an eight-point increase in
19 the offense level.

20 And the probation office has therefore calculated
21 the advisory guidelines correctly using the current
22 manual. I note that use of the November 1, 2012 manual
23 in effect during the commission of the offense produces
24 the same advisory guideline range.

25 The guideline for illegal reentry, in violation of

1 Section 1326 of Title 8, is found at 2L1.2 of the
2 guidelines. Subsection (a) provides that the base
3 offense level is eight. Because the defendant was
4 previously deported, or unlawfully remained in the United
5 States after a conviction for an aggravated felony, and
6 received a 12-month sentence following a felony
7 conviction for vehicle operator fleeing or eluding an
8 officer in Dane County, Wisconsin, eight levels are added
9 pursuant to Section 2L1.2(b)(1)(C). No other Chapter Two
10 adjustments apply. I should have said received a "year
11 and a day" sentence. I believe that's correct, although
12 maybe I should confirm that before I go on.

13 MR. BUGNI: Your Honor --

14 THE COURT: Yes. Was it a 12-month sentence?

15 MR. BUGNI: -- it was a 12-month sentence
16 followed by six months on a separate charge that would
17 allow for that.

18 THE COURT: Thank you. This leaves the
19 eight-level addition. And I find no other Chapter Two
20 adjustments apply, just as did the probation office.

21 The defendant qualifies for a three-level downward
22 adjustment under Section 3E1.2 because he has
23 demonstrated acceptance of responsibility for his offense
24 by pleading guilty and the government has moved for an
25 additional reduction.

1 This is a long wind-up to concluding with respect to
2 the sentencing guidelines that with a total offense level
3 of 13 and a criminal history category of III, the
4 defendant has an advisory guideline imprisonment range of
5 18 to 24 months. And it is there I begin to consider an
6 appropriate sentence under Section 3553(a).

7 I'm happy to hear from both counsel, and of course
8 from the defendant, although I have read the numerous
9 written submissions by the parties, including the
10 sentencing -- recent sentencing memorandum filed on
11 behalf of the defendant and the letters written by both
12 the defendant as well as family members on his behalf.
13 And I will begin with the government.

14 MR. JAROSZ: Nothing further, Your Honor. Thank
15 you.

16 THE COURT: Anything more for the defense?

17 MR. BUGNI: No, Your Honor. I would only add
18 that regardless of the guidelines, I really believe a
19 "year and a day" sentence is appropriate here. I've gone
20 over it almost *ad nauseam* in the sentencing memo. But I
21 will say that here you have a young man, this is the
22 first time on this charge. This is really meant as a
23 wake-up call. And a sentence of a year and a day
24 accomplishes everything that this court would hope for in
25 that respect.

1 THE COURT: All right. Is there anything more,
2 Mr. Vivas-Ceja, that you would like to say to the Court
3 before I render sentence?

4 THE DEFENDANT: All I want to say -- all I want
5 to do is apologize for having come back and for having
6 created problems here in the United States. That is all.

7 THE COURT: And you had indicated that you had
8 wanted to do that in your written letter to the Court as
9 well. An apology to the Court is fine, but the problem
10 that I have in trying to discern an appropriate sentence
11 is that you didn't just come back into the country
12 illegally on a number of occasions, but when caught this
13 time you repeatedly refused to take responsibility for
14 it. And I don't say that by denying you the guideline
15 reduction, because you have since come forward and pled
16 guilty. But you refused to report after being bonded
17 when you were caught at the airport, you refused repeated
18 opportunities to come in and self-report, and then you
19 fled; all of this done while hiding your identity in a
20 number of ways.

21 And for me the difficulty in the position that your
22 counsel is taking is that this doesn't suggest someone
23 who isn't going to do exactly the same thing when given
24 the opportunity. It suggests someone who, for whatever
25 reason -- and obviously your children is a strong pull --

1 for whatever reason you have not been willing to step up
2 until now. And you understand I have to weigh that in
3 trying to arrive at an appropriate sentence?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. In arriving at a
6 sentence I have considered the defendant's history. The
7 defendant was born in Mexico. He moved to the United
8 States with his extended family when he was just 12 years
9 of age. The defendant enrolled in school in this country
10 but dropped out within a few years. And he did so to
11 work, never returning to school.

12 The defendant has three minor children, all of whom
13 are U.S. citizens. He also owns a home in Beloit,
14 Wisconsin. However, the defendant failed to comply with
15 the requirements and directives of the U.S. Department of
16 Homeland Security and abandoned any right he may have had
17 to obtain permanent legal status in 2007, due in part, he
18 claims, to his attorney's malpractice.

19 The defendant appears to have earned a significant
20 income doing skilled work in this country, but did not
21 report this income or pay income taxes on his earnings,
22 no doubt because of the risk of detection. In fact the
23 defendant concealed his assets by registering multiple
24 vehicles under false names at a variety of addresses.

25 While the defendant's continued criminal conduct

1 during the two months he was aware of the pending federal
2 indictment and warrant did not rise to the level of
3 obstruction of justice, it speaks to the defendant's
4 ability and willingness to avoid detection by law
5 enforcement by utilizing aliases and fraudulent
6 documentation.

7 Moreover, his criminal history suggests that the
8 defendant has struggled with alcohol use, but did not
9 wish to discuss alcohol's role in his criminal history
10 with the probation office, neither did he express an
11 interest in participating in substance abuse treatment.

12 The defendant has also been deported on at least
13 three occasions since 2009 and returned each time
14 illegally within a month of deportation.

15 The defendant has made a habit of concealing his
16 identity, which demonstrates a lack of insight into the
17 seriousness of his offense or at least substantially
18 greater incentives to reoffend. Further, the defendant
19 has no plans to establish a life in Mexico, at least not
20 articulated, and has not voiced any future goals in that
21 regard.

22 The defendant's most recent arrest occurred after he
23 attempted to pass through security using a fake and
24 expired Mexican Voter ID at the Dane County Regional
25 Airport, reportedly to travel to California for his

1 grandmother's funeral.

2 After posting a bond the defendant absconded,
3 managing to avoid arrest for almost a year. Previously
4 he had been deported following multiple state court
5 convictions for operating a motor vehicle while
6 intoxicated in 2010 and fleeing and eluding -- I should
7 say following state court convictions for operating a
8 motor vehicle while intoxicated in 2010 and for fleeing
9 and eluding an officer in 2011.

10 Defense counsel noted three reasons for a downward
11 adjustment here: (1) until now, the defendant has only
12 one felony conviction and served one year in jail with
13 Huber law privileges; (2) he appears to have been a
14 diligent worker in this country; and (3) he has learned
15 his lesson. Unfortunately, these factors are more than
16 offset by the defendant's inability to confront his
17 alcoholism, which has fueled both dangerous use of
18 vehicles and possible domestic violence, as well as
19 repeated illegal, surreptitious reentry back into this
20 country.

21 Taking into consideration the nature of the offense,
22 as well as the defendant's personal history and
23 characteristics, I am persuaded that a guideline sentence
24 is reasonable and no greater than necessary to hold the
25 defendant accountable, protect the community, provide the

1 defendant the opportunity for rehabilitative programs and
2 achieve parity with the sentences of similarly-situated
3 offenders.

4 As to the one-count indictment -- I'm sorry. As to
5 Count 1 of the indictment, it is adjudged that the
6 defendant is committed to the custody of the Bureau of
7 Prisons for a term of 21 months.

8 Consistent with the provisions of Section 5D1.1,
9 Application Note 5, no term of supervised release is
10 imposed because the defendant is a previously-deported
11 alien and almost certainly subject to deportation again.

12 It is adjudged that the defendant is to pay a \$100
13 criminal assessment penalty to the Clerk of Court for the
14 Western District of Wisconsin immediately following
15 sentencing.

16 The defendant does not have the means to pay a fine
17 under Section 5E1.2(c), however, without impairing his
18 ability to support himself and his family upon release
19 from custody and so no fine will be imposed.

20 The probation officer is directed to send the U.S.
21 Immigration and Customs Enforcement a copy of this
22 judgment and to provide the Court with a copy of the
23 transmittal letter.

24 Finally, the U.S. Probation Office is to notify
25 local law enforcement agencies and the State Attorney

1 General of the defendant's release back into the
2 community.

3 I believe, Mr. Jarosz, the government has a motion
4 to dismiss the remaining count?

5 MR. JAROSZ: That's correct, Your Honor. We
6 would move to dismiss Count 2 at this time.

7 THE COURT: That is granted. Mr. Vivas-Ceja,
8 you have a right to appeal this court's sentence. And
9 you have very able counsel who did an effective job of
10 arguing for a lower sentence. It just was not one that I
11 could see justified on the overall record. That time to
12 appeal is very short, it's ten days, and you should
13 discuss the grounds for a possible appeal with your
14 counsel.

15 I'm more concerned on or more concerned with your
16 getting a message, which will only become more loudly
17 delivered should you continue to reenter this country. I
18 don't mean to minimize the incentives, including most of
19 all your children who are likely to remain here as a
20 reason for you to come back.

21 But at this point your conduct is such that you're
22 unlikely to ever be able to reenter, and certainly not to
23 reenter this country legally under current law. If you
24 do and are caught, you're facing even harsher penalties
25 than I've imposed today. And that's a reality under the

1 law, whether it is the best result or not and whether it
2 is consistent with your own view of what the immigration
3 laws should be.

4 And I hope you're able to find some way to remain in
5 contact with your children while complying with our
6 immigration laws. In any event, if you don't, you will
7 continue, as your counsel noted, to live in prison in
8 this country.

9 With that said, I don't have anything further.
10 Anything more for the government?

11 MR. JAROSZ: Your Honor, just for the purposes
12 of the appellate record here, is it the Court's -- would
13 the Court have imposed the same sentence regardless of
14 the finding it made on the fleeing and eluding an officer
15 under 346.04(3)?

16 THE COURT: I cannot say that and I'm not going
17 to say that.

18 MR. JAROSZ: That's fine.

19 THE COURT: I think, you know, I consider all
20 factors and I consider that among them. I do think that
21 that is the state of the law and so I began with that. I
22 also considered the 3553(a) factors. And whether I would
23 have come out the same way under those, I don't know.
24 But I gave a guideline sentence intentionally, weighing
25 all factors, including the fact that it was the advisory

1 guideline. So I don't know if that's the record you
2 wanted to make, but it is nevertheless the record that
3 you've made.

4 MR. JAROSZ: Thank you, Your Honor.

5 THE COURT: Anything more for the government?

6 MR. JAROSZ: No, Your Honor. Thank you.

7 THE COURT: All right. Anything more for the
8 defense?

9 MR. BUGNI: Nothing more for the defense, Your
10 Honor.

11 THE COURT: All right. Then we are adjourned.

12 (Adjourned at 1:32 p.m.)

13 ***

14 I, CHERYL A. SEEMAN, Certified Realtime and
15 Merit Reporter, in and for the State of Wisconsin,
16 certify that the foregoing is a true and accurate record
17 of the proceedings held on the 30th day of March, 2015,
18 before the Honorable William M. Conley, Chief Judge of
the Western District of Wisconsin, in my presence and
reduced to writing in accordance with my stenographic
notes made at said time and place.
Dated this 20th day of April, 2015.

19

20

/s/

21

Cheryl A. Seeman, RMR, CRR
Federal Court Reporter

22

23

24 The foregoing certification of this transcript does not
25 apply to any reproduction of the same by any means unless
under the direct control and/or direction of the
certifying reporter.